Supreme Court of the Hawaiian Islands--In Banco. October Term, 1887.

AH SING AND AH YOU HIS WIFE, vs. A. MCINTYRE AND JOHN GOMEZ.

Appeal from McCULLY J.

BEFORE JUDD, C. J., M'CULLY, PRESTON AND BICKERTON J. J.,

Opinion of the Court by PRESTON, J.

This is an action to recover two hundred dollars for damages alleged to have accrued to the plaintiff from the negligence of the defendant McIntyre's servant (defendant Gomez), in driving McIntyre's horse and carriage along Hotel street, Honolulu, against the plaintiff, Ah You.

The Police Magistrate dismissed the case against McIntyre and rendered judgment against the defendant Gomez for twenty dollars.

From this decision the plaintiff appealed to a Justice of the Supreme Court in Chambers, and the appeal was heard by Mr. Justice McCully, who rendered the following decision:

"The Plaintiffs complain that the defendant Gomez, the servant of the defendant McIntyre, being entrusted to drive the carriage of the latter, negligently and unskillfully drove against and injured Ah You, the plaintiff, wife of Ah Sung co-plaintiff. It is admitted or proved that the defendant Gomez in pursuance of orders drove the defendant McIntyre's son down town and left him, and was directed to drive back to his master's house. That he did not take the direct route thither, but drove along Hotel street to the west of Nuuanu street, on his way to see a friend of his living near St. Louis College. By his direct route he should not have gone west of Nuuanu street. He was driving rapidly and negligently about the distance of a block out of his route, when he ran against the plaintiff Ah You. She was injured severely, disabling her from work and requiring the aid of a nurse.

The sole question in argument before the Court is whether the servant in making this detour, on his own business, during which the accident occurred, was acting within the scope of his employment.

I find cases directly applicable to the facts in this case: In Joel vs. Morrison (1834), 6 Car. and Payne 501. Parke B. held that if a servant driving his master's cart on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any accasioned by his careless driving while so out of his road. But if a servant take his master's cart without leave at a time when he is not wanted for the purpose of business, and drives it about solely for his own purposes, the master will not be answerable. Following the case in 1839, in 9th Car. and Payne 607 Sleath vs. Wilson, before Erskine, J., a servant drove negligently against the plaintiff while driving out of his way on an errand of his own in the course of driving for his master, the master was held responsible, because he has put it in the servant's power to mismanage the carriage by entrusting him with it. In the decisions of the Supreme Court of the United States, Vol. 20, p. 294. Phila. and Reading R. R. Co. vs. Derby, 1852, the Court say The case of Sleath vs. Wilson, above cited, states the law in such cases distinctly and correctly. This Court says we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim *respondeat superior* would in a measure nullify it. This Court also cites the language of Mr. Justice Erskine thus: "Whenever the master has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant drives fast and through his negligence occasions an injury, the master will not be liable.

But that is not the law; the master in such case will be liable and the ground is that he has put it in the servant's power to mismanage the carriage by intrusting him with it.

The same doctrine with the same limitation is set forth in Smith's Master and Servant, supported by the cases here cited and many others. The law is uniform and clear; but when I come to the matter of judgment I find a difficulty, not touched on by either counsel, in the joinder of the master and the servant, as defendants. It will be observed, that in all the cases cited, the master is the sole defendant. Upon the authority of Parsons vs. Winchell 5 Cush 592, the action against the master and servant jointly cannot be maintained. The tort is not a joint one. The master is not liable as if the acts were done by himself, but because the law makes him answerable, says the Court per Metcalf, J. If the master may have suffered a judgment and satisfied it, he may call upon the servant for re-imbursement, but this he cannot do if the servant have been made a co-defendant as a joint *tort feasor*. The master cannot be deprived of this right by the plaintiff's act of joining the servant with him. Error would lie upon a judgment against them as joint defendants. Since this case comes into this Court as it was brought and adjudged in the Police Court and must be so brought. I here dismiss the complaint."

From this decision the plaintiff appealed to this Court and contended that the defendants sustaining the relation of master and servant to each other were properly joined and cited.

Carman v. *Steubenville and Indiana R. R. Co.* 4 Ohio 399.

Wright v. *Wilcox* J. and S. 19 Wendell 343.

Whitmore v. *Waterhouse* 4 Car. and P. 383.

The case of *Carman* v. *S. & I. R. R. Co.* does not seem to apply to the case at bar. It was an action against the Company for injuries done to the plaintiff's property by a contractor employed by the company to blast stone upon the company's land which adjoined the plaintiff's land and the Court held the company liable.

Wright v. *Wilcox* is an authority in favor of the plaintiff. There the Court held that the father and employer of the driver of a wagon would be liable jointly with the driver for negligence of the latter, but held that he was not liable in that case, because the act of the driver was willfull.

Whitmore v. *Waterhouse* was an action against the proprietors and driver of a stage coach for the negligent driving of the latter, and the Court (Parke B.) held on the authority of *Michael* v. *Alestree* 2 Levinz 172, that the defendants might be joined, but intimated that the point could be raised in arrest of judgment. Whereupon counsel for the plaintiff discontinued against the servant and the jury having found a verdict for the other defendant the case was not taken further.

The case of *Michael* v. *Alestree* was against master and servant jointly. The master sent his servant to train his ungovernable horses in Lincoln's Inn Fields, who being unable to govern them, they ran upon the plaintiff and injured him.

This case may be supported upon the ground that the injury was not the result of negligence on the part of the servant, but was caused by the act of the master himself in entrusting his servant with such dangerous animals.

We are of opinion that the law as laid down in *Parsons* v. *Winchell* is correct and therefore the judgment appealed from must be affirmed.

The question as to the liability of the master for the negligence of his servant was decided in the plaintiff's favor and does not arise on this appeal.

The appeal is dismissed with costs.

J. A. Magoon for plaintiffs; P. Neumann for defendant McIntyre.

Dated Honolulu, Nov. 30, 1887.

In the Supreme Court of the Hawaiian Islands--In Banco. October Term. 1887.

JOHN GARCIA V. J. P. MENDONCA, ADMINISTRATOR, &C.

On Appeal from BICKERTON J.

BEFORE JUDD, C. J., M'CULLY, PRESTON AND BICKERTON J., J.

Opinion of the Court by PRESTON J.

This case was originally brought in the Police Court, Honolulu, and the plaintiff sought to recover $100 for work and labor done and performed by the plaintiff for Domingo Lopes Ramos in his lifetime and for money paid.

The defendant was sued as administrator of Ramos.

At the trial in the Police Court the plaintiff having stated that he was a partner with the deceased was non-suited.

From this decision he appealed and the appeal was heard before Mr. Justice Bickerton, who rendered a judgment in favor of the defendant upon the application of counsel for the defendant upon the grounds:

1st. That it had not been proved that Mendonca was administrator.

2d. That there was no proof that the claim was presented within six months from the appointment of the administrator.

The plaintiff asked leave to amend which was refused.

The plaintiff appealed to the Supreme Court in banco.

The first appeal being taken from a judgment of non-suit, there should not have been a rehearing upon the facts. The sole point was whether ——the evidence before the Police magistrate justified the non-suit, and it is in this view we have considered the case.

It appears to us from the evidence that the plaintiff and the deceased were jointly interested in the work out of which the claim arose and that the deceased was to pay the plaintiff or divide the money when he received it from the government.

The money was not paid to the deceased but was collected by the defendant, and it therefore seems to us that the plaintiff had no right of action against the deceased at the time of his death, consequently it was not necessary for him to put in his claim against the estate.

Supposing the plaintiff and deceased were partners, the plaintiff as surviving partner was entitled to receive the money and to account with the administrator, but the administrator having received it the plaintiff is entitled to recover his share. What that share is must be determined by another suit if the parties cannot agree.

We are of opinion that the non-suit in the Police Court was right upon the evidence and that the appeal should have been dismissed.

Under these circumstances it is not necessary for us to decide the question as to the right to amend in the appellate court, although we think that as a rule such amendments should not be allowed and that the application should be made to the Police magistrate.

We may, however, say that where the refusal to amend, would by the operation of a statute of limitation bar the plaintiff from bringing a new action, an amendment ought to be allowed.

Kirk v. *Dolly*, 6 Mees and W. 636.
Larkin v. *Watson*, 2 Cromp. and Mees.
Davis v. *Saunders*, 7 Mass. 62.

The appeal must be dismissed.

J. A. Magoon for plaintiff; C. Brown for Defendant.

Dated Honolulu, 29th Nov., 1887.